

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

42-1 50513
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FILE: B-216291

DATE: February 25, 1985

MATTER OF: City Auto Parts and Supplies

DIGEST:

Where during the pendency of protest procuring agency admits error in calculating government estimate, resolicits requirement, and intends to terminate procurement which used erroneous estimate, protest has become moot. Claim for bid preparation costs and legal fees incurred in pursuing protest is denied.

City Auto Parts and Supplies (City Auto) protests the award of a requirements contract to Post "NAPA" Parts, Inc. (NAPA) under invitation for bids (IFB) No. DABT01-84-B-1011, issued by the Department of the Army, Fort Rucker (Army), Alabama.

City Auto maintains that the government's estimate for parts obtainable only from the original equipment manufacturer (OEM) contained in the IFB was overstated when compared to the actual cost the government incurred under prior contracts. The Army responds that the estimate cannot be supported as correct and that it is taking corrective action by issuing a second solicitation. City Auto was provided a copy of the solicitation. Also, the Army advises that it intends to terminate the remaining portion of NAPA's contract for the convenience of the government.

In light of the Army's actions, we find that City Auto's protest has become moot. However, City Auto contends that it is entitled to bid preparation costs. City Auto advises that due to the Army's erroneous estimate it has been the second lowest bidder for the past 2 years. City Auto argues that it would have been awarded these contracts if the government estimate had been accurate. City Auto contends that it should be awarded bid preparation costs because it bid from an incorrect estimate each year and engaged the services of an attorney to bring the matter to the attention of the Army.

Initially, we point out that the portion of City Auto's claim which is based on the prior year procurement, which was never protested to our Office, is untimely and not for

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consideration. See DWC Leasing Company, B-186481, Nov. 12, 1976, 76-2 C.P.D. ¶ 404. With regard to the timely portion of the claim, the award of bid preparation costs is only justified where the claimant shows both that the government's conduct toward the claimant's bid was arbitrary and capricious, as opposed to merely negligent, and that if the government had acted properly, the claimant would have had a substantial chance of receiving the award. Builder's Security Hardware, Inc., B-213599.2, Feb. 15, 1984, 84-1 C.P.D. ¶ 207. In the circumstances of this case, we cannot conclude that the Army's actions were arbitrary and capricious with respect to City Auto's bid. We can only assume that the Army miscalculated the OEM estimate through negligence, which standing alone does not constitute arbitrary and capricious action sufficient to give rise to the recovery of bid preparation costs. Chrysler Corporation, B-206943, Sept. 24, 1982, 82-2 C.P.D. ¶ 271. At the time the protest was filed, there was no legal basis for allowing a protester to recover legal fees incurred in pursuing a bid protest. M.L. MacKay & Associates, Inc., B-208827, June 1, 1983, 83-1 C.P.D. ¶ 587. Cf. 49 Fed. Reg. 49, 917, 49, 920 (1984) (to be codified at 4 C.F.R. § 21.6(d)(1)).

The claim for bid preparation costs is denied.

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